(3)

No. 94-1232

Supreme Court, U.S.
FILED
FEB 14 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK,

Petitioner,

vs.

THE ESTATE OF JOAN POPP,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Eighth District

REPLY BRIEF

ROY E. LACHMAN, Esq.
Counsel of Record
200 Ohio Savings Plaza
1801 East Ninth Street
Cleveland, Ohio 44114
(216) 622-4363

MARC W. FREIMUTH, Esq.
200 Ohio Savings Plaza
1801 East Ninth Street
Cleveland, Ohio 44114
(216) 622-4326

Attorneys for Petitioner
Ohio Savings Bank

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

7 pp

TABLE OF AUTHORITIES

Page

CASES:

Goodrich v. Anderson, 136 Ohio St. 509, 26 N.E.2d 1016 (1940) 2

STATUTES

Ohio Revised Code Section 1343.03(A) 3

Ohio Revised Code Section 2929.11(C)(2) 3

Ohio Revised Code Section 2929.31 3

No. 94-1232

In The

Supreme Court of the United States

October Term, 1994

OHIO SAVINGS BANK,

Petitioner,

vs.

THE ESTATE OF JOAN POPP,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Ohio, Eighth District

REPLY BRIEF

Respondent has raised a number of new and potentially misleading issues in its Brief in Opposition. Petitioner has addressed them below by numbered paragraphs.

1. Respondent has relied heavily on materials that are not in the record before this Court, but in the record of other, separate proceedings involving Petitioner and non-parties hereto:

(a) Brief in Opposition, page 7, middle, to page 8, bottom of top paragraph;

(b) Brief in Opposition, page 18, paragraph 2;

(c) Brief in Opposition, page 19, paragraph 3; and

(d) Appendix, pages 18 through 30 (depositions and briefs in another case).

These materials should be disregarded.

2. Respondent has contended at length on page 9 of its Brief that an action under Ohio Revised Code Sections 2109.50-2109.52 is a civil action only, and has cited several older Ohio Court of Appeals cases as support. However, Respondent has deliberately ignored the Ohio Supreme Court's holding that "the special proceeding instituted on such a complaint is *quasi-criminal* in character." *Goodrich v. Anderson*, 136 Ohio St. 509, 512, 26 N.E.2d 1016 (1940) (emphasis supplied). This decision has not been overruled, and remains good law in Ohio.

3. Respondent has apparently argued (Brief, pp.12-17) that, since no incarceration was imposed on Petitioner, but a felony-level fine, no criminal conviction occurred. However, Respondent has missed the point presented in Petitioner's "Questions Presented for Review": that it was convicted upon summary judgment, and suffered punishment at the level of a felony.

Moreover, Respondent has ignored the obvious fact that Petitioner, a savings institution, could not by definition have been "incarcerated." Individuals are incarcerated, not corporations. Monetary or injunctive penalties are imposed upon corporations. This is what occurred here.

Finally, Respondent has failed to note that, while the penalty imposed upon Petitioner was at the level of a second-degree felony for individuals, Ohio Revised Code Section 2929.11(C)(2), it was also at the level of a fourth-degree felony with respect to organizations such as Petitioner:

> (A) Regardless of the penalties provided in sections 2929.02, 2929.11, and 2929.21 of the Revised Code, an organization convicted of an offense pursuant to section 2901.23 of the Revised Code shall be fined, which fine shall be fixed by the court as follows:
>
> * * *
>
> (6) For a felony of the fourth degree, not more than ten thousand dollars.

O.R.C. § 2929.31

In short, whether the fine was at the level of a felony of the second or fourth degree is immaterial, since Petitioner was effectively convicted of a crime without *mens rea* or any willful wrongdoing. Respondent has failed to address Petitioner's substantial Constitutional issues in this regard, and has instead relied on the simplistic notion that, since the Bank was not incarcerated, then by definition it was not convicted of a crime. The Court should reject such a facile argument.

4. Respondent has argued that the ten percent (10%) penalty imposed on Petitioner "is the equivalent to the 10% interest rate applicable to a plaintiff [sic] judgment in a civil proceeding required by § 1343.03(A) of the Ohio Revised Code." Br. at 11. What Respondent fails to mention is that the judgment against Petitioner was for

"$55,833.86 *plus* the 10% penalty thereon *plus* interest at the rate of 10% per annum . . . " (Petitioner Appendix 25; Judgment Entry of November 3, 1992, emphasis supplied.) In short, the ten percent (10%) penalty imposed on Petitioner was in addition to interest on the judgment, not a substitute or "equivalent" therefor.

5. Respondent has contended that Petitioner waived its right to a jury trial by filing a Motion to Dismiss and/or For Summary Judgment. Br. at 19. This makes no sense. As the record below shows, the trial court established deadlines for filing such motions. Nowhere did Petitioner *waive* its right to a jury trial. Quite the contrary, it made a jury demand. By Respondent's illogic, every time a party files a dispositive motion – whether in a civil proceeding or a criminal one – it would waive the right to a jury trial. Respondent has furnished no authority to support this startling contention for the simple reason that there is none. Nor does the filing of such a motion concede that Respondent's claim was civil rather than criminal. Quite the contrary: in all pleadings, Petitioner asserted that the proceeding was improperly brought as a quasi-criminal or criminal action.

For the above reasons, a writ of certiorari should be granted so that the substantial Constitutional issues – largely ignored by Respondent – may be squarely addressed.

Respectfully submitted,

ROY E. LACHMAN, Esq.,
Counsel of Record
200 Ohio Savings Plaza
1801 East Ninth Street
Cleveland, Ohio 44114
(216) 622-4363

MARC W. FREIMUTH, Esq.
1801 East Ninth Street
Second Floor
Cleveland, Ohio 44114
(216) 622-4326

Attorneys for Petitioner
Ohio Savings Bank